



August 14, 2008

Via email and Regular Mail

Doug Dunham
Deputy Assistant Director
Water Management Division
Arizona Department of Water Resources
3550 North Central Avenue
Phoenix, AZ 85012

Re: Comments by the Town of Prescott Valley pursuant to ARS §41-1023 in Support of the Department's Proposed Groundwater Transportation Rules

Dear Mr. Dunham:

As one of the intended beneficiaries of ARS §45-555, the Town of Prescott Valley appreciates the opportunity to review and comment on the groundwater transportation rules (R12-15-1401 through 1410) proposed by the Arizona Department of Water Resources (Department) to implement ARS §45-555 (among other provisions) (hereinafter "Rules").

The Legislature enacted ARS §45-555 to give the communities in the Prescott Active Management Area (PrAMA), which lacked practical access to Central Arizona Project (CAP) water, the ability to augment their restricted groundwater supplies with a certain amount of groundwater imported from the Big Chino Sub-basin (Big Chino). This right represents a substantial portion of the total water supply available to the PrAMA communities, and the significance of this right to the citizens and future residents of the Town and other PrAMA communities cannot be overstated.

Given the importance of this right, the Town has engaged in a careful review of the Rules and finds them to be: (i) consistent in all respects with the language and legislative intent of ARS §45-555, (ii) within the scope of the Department's statutory authority; (iii) entitled to deference under Arizona Supreme Court holdings, and (iv) sound water policy for the State of Arizona as a whole.

Analysis

1. The Rules are Consistent with the Plain Language and Legislative Intent of ARS §45-555

"The primary principle of statutory interpretation is to determine and give effect to legislative intent." *Wyatt v. Wehmuller*, 167 Ariz. 281, 284 (1991). "The best and most reliable index of a statute's meaning is its language." *Lowing v. Allstate Ins. Co., Inc.*, 176

Ariz. 101, 103 (1993). "That language, where clear and unequivocal, controls the statute's meaning unless it leads to absurd or impossible results." *Id.* at 103-04.

In ARS §45-555, the Legislature articulated two exceptions to the general prohibition against transporting groundwater from a basin outside of an AMA into an AMA. Both exceptions apply to transportation of groundwater from the Big Chino Sub-basin to PrAMA, and both exceptions are carefully and specifically delineated in nature, scope and application.

The first exception is contained in ARS §45-555(A-D). This is the exception that the Rules are drafted to implement. It authorizes a "city or town that owns land consisting of historically irrigated acres in the Big Chino sub-basin" or "a city or town with the consent of the landowner" to transport a limited amount of "groundwater" specified in the statute to the PrAMA. ARS §45-555(A). The maximum quantity is based on an "annual transportation allotment" determined by the Department Director. *Id.* §45-555(B). The Director's determination must be based on the following three-step process:

- (1) Step 1: determine "each farm or portion of a farm owned or leased by the city or town in the sub-basin" ["Farm" is defined as "an area of land in the sub-basin that is or was served by a common irrigation water distribution system" *Id.* §45-555(D)(2)];
- (2) Step 2: determine the "historically irrigated acres" (HIA) retired from irrigation "[f]or each such farm or portion of a farm" ["Historically irrigated acres" is defined as "acres of land overlying an aquifer that were irrigated with groundwater at any time between January 1, 1975 and January 1, 1990" *Id.* §45-555(D)(3)]; and
- (3) Step 3: multiply the sum of the retired HIA acres by "three acre-feet per acre."

Id. §45-555(B). The Director's determination must also be based on "credible documentary evidence submitted by the city or town or otherwise obtained by the department." *Id.* §45-555(C). "Documentary evidence" includes "correspondence, contracts, other agreements, aerial photography, affidavits, receipts or official records." *Id.* §45-555(D)(1).

This language is "clear and unequivocal". Therefore, the analysis centers on whether the Rules "ascertain and give effect to the legislative intent behind the statute." *Calvert v. Farmers Ins. Co. of Arizona*, 144 Ariz. 291, 294 (1985). The Rules clearly do give effect to legislative intent for three reasons.

First, the Rules adopt and apply the plain language of the statute in its entirety. This includes:

- (i) who is qualified to transport groundwater from the sub-basin; Compare ARS §45-555(A) ("city or town that owns land consisting of historically irrigated acres in the Big Chino sub-basin" or "a city or town with the consent of the landowner") with R12-15-1401(7) (same);

- (ii) what the transportation limit is; *Compare* ARS §45-555(A)(1-2) (The amount of groundwater withdrawn and transported shall not exceed the limits prescribed in ARS §45-555 (A)(1) and (A)(2); *with* R12-15-1406(A) (same);
- (iii) how the transportation limit is calculated; *Compare* ARS §45-555(A)(1-2) (the transportation limit prescribed in ARS §45-555 (A)(1) and (A)(2) is calculated based on an "annual transportation allotment" determined by the Director); *with* R12-15-1405(A) (same);
- (iv) who is authorized to calculate the transportation limit; *Compare* ARS §45-555(B) (the "director shall determine the annual transportation allotment"); *with* R12-15-1405(A-B) (same);
- (v) the process for calculating the transportation limit; *Compare* ARS §45-555(B)(1-2) (outlining a three-step process for the Director to use to determine the "annual transportation allotment"); *with* R12-15-1404 and R12-15-1405 (same); and
- (vi) the evidence to be relied upon to calculate the transportation limit. *Compare* ARS §45-555(C-D) (in making the "annual transportation allotment" determination the Director shall rely "only on credible documentary evidence" submitted by the city or town or otherwise obtained by the Department); *with* R12-15-1404(B) (same).

Second, the Rules adopt and apply the same three-step process outlined by the Legislature as the procedure the Director must follow when determining the "annual transportation allotment" upon which the groundwater transportation limits in ARS §45-555(A)(1) and (A)(2) are based. *Compare* ARS §45-555(B)(1-2) (outlining a three-step process for the Director to use to determine the "annual transportation allotment"); *with* R12-15-1404 and R12-15-1405 (same).

Third, the Rules adopt and apply all of the defined terms in the statute without change. *Compare* ARS §45-555(D) (defining "documentary evidence," "farm" and "historically irrigated acres") *with* R12-15-1401(5), (8) and (11b) (same).

Accordingly, the Rules accurately and completely give effect to the language and legislative intent of ARS §45-555(A-D).

2. The Rules are Within the Scope of the Director's Statutory Authority

The Director is statutorily authorized to "[a]dminister all laws relating to groundwater" and to "perform all powers and duties vested in or imposed upon the department" including adopting and issuing rules necessary to carry out the purposes of the Groundwater Code. *Id.* §45-105(B)(1-2). The Director is also the party designated by the Legislature to determine the "annual transportation allotment" upon which the groundwater

transportation limits in ARS §45-555(A)(1) and (A)(2) are based. Accordingly, the Rules giving effect to the provisions of ARS §45-555(A-D) are well within the scope of the Director's authority.

3. The Rules are Entitled to Deference

The Groundwater Code was "designed to protect the state's economy and welfare, and to 'provide a framework for the comprehensive management and regulation of the withdrawal, transportation, use, conservation and conveyance of rights to use the groundwater in this state.'" *Arizona Water Co. v. Arizona Dept. of Water Resources*, 208 Ariz. 147, 148 (2004) (quoting ARS §45-401(B)). "Responsibility for these critical matters was placed in the hands of ADWR headed by a Director with sweeping 'general control and supervision' of groundwater." *Id.* (internal citations omitted). The Legislature required the Director to be an expert in the field. ARS §45-102(D). The Director's interpretation of ARS §45-555(A-D) in the creation and proliferation of these Rules should therefore be accorded "considerable deference." *Id.* at 155.

4. The Rules are Sound Water Policy for the State of Arizona

Apart from implementing the language and intent of ARS §45-555, the Rules establish sound water policy and management practices for the State of Arizona, thereby fulfilling the legislative policy and directive to the Department to effectively manage and regulate the State's groundwater supplies. ARS §§45-103(B); 45-563(A). Three aspects of the Rules, in particular, are noteworthy for this reason.

First, the Rules are consistent for all transportation basins from which transportation of groundwater to an AMA is allowed by the Legislature. Other parties have argued that the Rules should be more lenient for some transportation basins from which they stand to benefit (i.e., transportation basins available to the Phoenix AMA) and more stringent for others from which they do not stand to benefit (i.e., transportation basins available to PrAMA). However, there is no language in the subject statutes, nor is there a discernable legislative intent or purpose, that would require the Director to apply inconsistent standards and management practices among transportation basins. The Rules adopt the only reasonable interpretation: that the Legislature intended for the standards and management practices applicable to each of these transportation basins to be consistent (in the same way the Legislature applied a consistent management goal of "safe-yield" for each of the AMA's that stand to benefit from these transportation basins). "In circumstances like these, in which the legislature has not spoken definitively to the issue at hand, 'considerable weight should be accorded to an executive department's construction of a statutory scheme it is entrusted to administer.'" *Arizona Water Co.*, 208 Ariz. at 154 (citing *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 844 (1984)). Indeed, "ADWR is 'precisely the type of agency to which deference should presumptively be afforded.'" *Arizona Water Co.*, 208 Ariz. at 155 (citing *Fed. Election Comm'n v. Democratic Senatorial Campaign Comm.*, 454 U.S. 27, 37 (1981)).

Second, R12-15-1408(B) provides that water rights derived from retiring HIA can be aggregated and developed from a single point of withdrawal. This Rule is a reasonable construction of the language of ARS §45-555 and within the Director's broad authority to implement rules to effectively manage the State's groundwater supplies. ARS §§45-103(B), 45-105(B)(1).

- The Rule is derived from the language of ARS §45-555(A-B). In particular, ARS §45-555(B) requires that the Director determine a single "annual transportation allotment" for all retired HIA owned or leased by a city or town. The amount of groundwater that the city or town may "*withdraw from the land*" shall not exceed: (1) in any year, two times the "*annual transportation allotment for the land*;" and (2) for any time period of ten consecutive years, ten times the "*annual transportation allotment for the land*." *Id.* §45-555A1-2. This language, when read as a whole, makes it clear that the Legislature (i) intended "the land" to refer to all HIA lands owned or leased by a city or town, and (ii) intended to allow the city or town to withdraw all of its HIA groundwater from anywhere on that land. Had the Legislature intended to require withdrawal of groundwater rights only from the associated parcel of land, it would have required the Director to determine an annual transportation allotment for each parcel of HIA land, rather than a single "annual transportation allotment" for all HIA land owned or leased by a city or town. The Director's interpretation of this statutory scheme is reasonable and entitled to "considerable weight and deference." *Arizona Water Co.*, 208 Ariz. at 154-55.
- The Rule also represents sound water policy and management because it constitutes a practical application of the statute that allows a city or town to develop one well site, pump its groundwater rights from one location instead of requiring a myriad of well sites, pipelines and pumping locations throughout the basin which would be neither fiscally feasible or good water policy for the basin.

Third, the Rules do not attempt to address, much less resolve, the dispute over whether the water to be transported is groundwater or sub flow. Instead, the Rules merely adopt and apply the language of the statute providing for transportation of groundwater in an amount based upon the Director's determination of retired HIA rights. While some parties may argue that the Director should have incorporated into the Rules a distinction between rights to transport groundwater versus sub flow, the Director appropriately declined to do so. The issue of groundwater versus sub flow is currently the subject of an ongoing adjudication in Maricopa County Superior Court – the forum statutorily-authorized to resolve the issue. *See, e.g., In re the General Adjudication of All Rights to Use Water in the Gila River System and Source*, 198 Ariz. 330 (2000); ARS §45-252(C) (determinations regarding the priority and use of water in a river system are to be brought in superior court in the county in which the "largest number of potential claimants reside."). Until the issue is adjudicated, HIA land is presumed to have been irrigated with groundwater. *Davis v. Agua Sierra Res., L.L.C.*, 217 Ariz. 386, 391 (Ariz. App. 2008). The Director is entitled to rely on that presumption for

purposes of these Rules unless and until the adjudicating court concludes otherwise in a final, binding judgment.

CONCLUSION

The Town expresses its thanks to the Department for its hard work and thoughtful effort in developing the Rules. The proposed Rules comport in all respects with the statutory language and legislative intent of the subject statutes, are well within the scope of the Director's statutory authority, are properly accorded considerable weight and deference, and fulfill the Legislature's directive to the Department to employ sound water policy and management practices to secure the State's limited groundwater supplies. For these reasons, the Town supports approval of the Rules, as drafted, in their entirety.

Sincerely,



John Munderloh
Water Resources Manager
Town of Prescott Valley